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FILED
MAY 23 1958
FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 251.

PANAMA CANAL COMPANY,

Petitioner,

v.

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY *et al.*,

Respondents.

No. 252.

GRACE LINE, INC., ISBRANDTSEN COMPANY, INC., LUCKENBACH STEAMSHIP COMPANY, INC., MATSON NAVIGATION COMPANY, MOORE-McCORMACK LINES, INC., ORE NAVIGATION CORPORATION, CALMAR STEAMSHIP CORPORATION, POPE AND TALBOT, INC., STATES MARINE CORPORATION OF DELAWARE, UNITED FRUIT COMPANY, UNITED STATES LINES COMPANY, WEYERHAEUSER STEAMSHIP COMPANY *et al.*,

Petitioners,

v.

PANAMA CANAL COMPANY,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' APPLICATION FOR AMENDMENT OF OPINION.

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RESPONDENTS' APPLICATION FOR AMENDMENT OF OPINION.

(Emphasis added.)

Respondents respectfully request the Court to make certain amendments in its opinion herein, announced April 28, 1958, so as to correct what respondents submit are

errors of fact based upon statements, or misstatements, in petitioner's brief.

That the Panama Canal tolls situation is a continuing one and that this Court's decision is by its terms applicable only to "the controversy at present" and "at this stage" foreshadows legislative and judicial hearings at which this Court's opinion will receive close attention. Respondents submit that it is therefore more than usually important that the opinion be wholly accurate factually.

I. Statements in the opinion indicating that there was a dispute between petitioner and the Comptroller-General over the extent of its allocations, i.e., over accounting practice as distinguished from statutory interpretation.

(A) At page 6 the opinion states:

> "The Comptroller General in 1955 expressed the view that the petitioner had allocated too high a share of the costs of the Canal Zone Government, of the corporate overhead, and of interest payments to the operations of the Canal and too little to its supporting or auxiliary activities."

This sentence is taken almost word-for-word from page 13 of petitioner's brief. It is, however, wholly unsupported, indeed, directly contradicted by the Record. The fact is that petitioner had made no allocations whatever. The Comptroller-General's 1954 report, made in 1955, so states (R. 52),* And again at R. 42, the Comptroller-General said:

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*"We made allocations of interest, administrative and other general expenses, and the net costs of Canal Zone Government on the bases explained in the footnotes on page 13. A similar study was not made by the Company."

> "However, the Company did not have available for our examination an analysis to determine the financial results by activities."

In his 1955 report, made in 1956, the Comptroller-General asserted at page 18:

> "During our 1955 audit we again requested the Company to furnish an analysis of financial results by activity. Although we were informed that an analysis had been prepared, it was not made available for our use."

Not only was there no dispute in 1955 between the Company and the Comptroller-General over the extent of its allocations, but the Comptroller-General, in so far as the Company had, in former times, indicated a theory as to allocation, adopted it. Thus corporate overhead was allocated by the Comptroller-General in 1955 on the "direction-of-effort basis . . . used by the Company in 1953 for statistical purposes." R. 54, footnote (c).

Petitioner has thus made no allocations whatsoever. There was nothing with which the Comptroller-General could disagree.

However, it is clear from the statement in this Court's opinion on page 6 that this Court was misled by petitioner's brief into thinking that there was a dispute respecting the allocations of petitioner's general expenses in the calculation of the tolls formula.

(B) On page 8 of the opinion the Court refers to a "conflict" over "cost accounting" and on page 9 to "petitioner's . . . methods of accounting and cost allocation."

We have, we believe, demonstrated that there is no such conflict, and that petitioner, having made no cost allocation, can hardly be said to have a "method" of cost allocation.

These statements also reflect, we believe, the Court's misapprehension resulting from the misstatement on page 18 of petitioner's brief.

(C) Out of abundance of caution we also refer to the question which on page 8 of the opinion the Court says "involve problems of statutory construction and cost accounting; whether an operating deficit in the auxiliary or supporting activities is a legitimate cost in maintaining and operating the Canal for purpose of the toll formula."

Petitioner never published any *accounts* showing such a deficit as a cost of maintaining and operating the Canal "for purpose of the toll formula," or for any purpose. Petitioner's accounts of the cost of maintaining and operating the Canal are wholly acceptable to the Comptroller General and respondents. We annex, as Appendix A, its account of such costs for 1954 (taken from page 49 of its 1954 report), which is typical of petitioner's statements in its annual reports as to costs of maintenance and operation of the Canal.

Petitioner's theory in this respect is wholly one of statutory construction as can readily be observed from pages 15-20 of the Reply Brief, the only place in which it is squarely advanced. No accounting problems are involved.

Because this Court was misled by the misstatement on page 18 of petitioner's brief into thinking that there were differences as to the allocation of the general expenses and therefore disputes over accounting practices, whereas there are no such disputes, respondents ask that the sentence from page 6 of the opinion, and the other references to disputes over accounting and allocation be eliminated from the opinion.

II. The statement that the tolls formula contemplated that tolls should be fixed at less than cost.

On page 3 of the opinion occurs the following statement:

> "It was learned [during the legislative investigation preceding the Act of September 26, 1950] that if the Canal were operated at cost, the tolls would have to be raised to a prohibitive level."

This statement also was taken almost word-for-word from a sentence in petitioner's brief, a sentence on page 14. Again, the sentence is incorrect and is not supported by the citations to the Record given by petitioner at page 14.

This statement may have the most serious consequences for respondents, because it seems to imply that respondents are trying to get tolls fixed at less than cost. The contrary is true. All that respondents seek is a fair allocation to Canal transit of the aggregate costs of the combination of national defense, overseas military base and ship canal which the United States operates at Panama.

Congress fully appreciated this problem. As can readily be seen from an examination of House Resolution 44* annexed hereto as Appendix B, which initiated the Congressional investigation which led to the Act of September 26, 1950, the whole purpose of that Act was to allocate to tolls their proper share of this aggregate cost.

But to return to petitioner's incorrect statement on page 14 of its brief. Petitioner cites the hearings on the bill that became the Act of 1950 at R. 109 and R. 126, and in particular the testimony of Mr. Seidman, the representative of the Bureau of the Budget. But it is entirely clear from Mr. Seidman's testimony that what would require that tolls be "raised" was not "cost," but the "existing for-

* 81st Cong. 1st Sess. (95 Cong. Rec. 1617).

mula" and that the existing formula included elements properly allocated to the military and the Government as distinguished from commercial transits. As to the interest rate, the existing formula provided an arbitrary 3%, whereas the new act was to provide interest at cost. *In other words, the objective of the Act was to achieve the proper cost of Canal transits, not to relieve tolls of any proper cost.*

Mr. Seidman's testimony at R. 109-110 was as follows:

> "*Under the existing formula*, revenues from tolls, together with profits from the Canal's business operations and miscellaneous civil revenues, are supposed to produce an amount sufficient to cover:
>
> "1. A 3-percent return on a capital investment of approximately $534,000,000 in the Panama Canal, including the investment in civil government, health and sanitation facilities. (This is a book figure and interest is not actually paid to the Treasury.)
>
> "2. The costs of operating and maintaining the Canal.
>
> "3. The net cost of civil government, health, and sanitation, including the cost of school facilities provided for children of military personnel and personnel employed by the military.
>
> "4. The cost of transiting military and Government vessels through the Canal.
>
> "The objective of the present formula has not been achieved in practice and the Canal accounts reflect substantial losses.
>
> "I think that has been so almost since the time this formula has been followed.
>
> "If the Canal were to be made self-sustaining *on this basis*, tolls would have to be increased to at least $1.40 a ton.

"Several basic changes are made in this formula by H. R. 8677, considered in connection with Public Law 808, which was the charter of the Panama Railroad Company. This act is primarily an amendment to the Panama Railroad charter. Under the new formula, revenues from tolls would be expected to cover:

"1. Interest at the 'going' rate (approximately 2.3 percent at the present time) on the capital investment in the Panama Canal, excluding the amount of any investment in national defense and civil government facilities and extraordinary expenditures or losses incurred through national policy and not related to the Company's operations. The Company would be required actually to pay interest to the Treasury.

"There would be offset against the amount of the investment subject to interest a proportionate share of the dividends which have been paid into the Treasury by the Panama Railroad Company. These amount to approximately $38,000,000. I think that figure is a little high. That is now provided for under existing law. Under the House amendment, there would also be excluded from the investment approximately $129,000,000, representing interest during the construction period.

"2. The costs of operating and maintaining the Canal—that is the same in both formulas.

"3. Approximately 50 percent of the net costs of civil government, health and sanitation. The remainder of these costs would be borne by the other corporate divisions such as the railroads, hotels, harbor terminals, steamship lines, utilities, commissaries, etc., out of revenues derived from the sale of goods and services."

Thus the quotation shows the incorrectness of petitioner's assertion at page 14 that "it was discovered that,

if the Canal were operated at cost, the tolls would have to be raised to $1.40, a clear prohibitive figure." (This quotation shows clearly, respondents believe, what was meant by "costs of maintaining and operating the Canal.")

Respondents therefore respectfully request the elimination of the word "cost" from the sentence on page 3, and the substitution of the words "preexisting formula".

III. Statements that "it is at least arguable that Congress has sided with petitioner" because Congress has "approved . . . budgets . . . based on petitioner's interpretation of the statute," citing 69 Stat. 235-237, 70 Stat. 322-324, 71 Stat. 78.

The statements quoted above appear on page 9.

Respondents submit that Congress's attitude was one of studied neutrality that does not warrant the expression "at least arguable." Of course anything is "arguable."

But the statutory references do not use the word "approve." Congress, in accordance with 31 U. S. C. §849, "authorized . . . expenditures" but only "within the limits of funds and borrowing authority available to it and in accord with law" by the cited statutes.

The report of the Senate Interstate and Foreign Commerce Committee after the hearings referred to at footnotes 3 and 4 of the opinion,* stated at page 25 that it did not wish "to legislate on the key words that are now the subject of litigation." On page 26, referring to "Business losses," the report said: This is the issue in litigation and

* The report itself is referred to at footnote 4.

the committee do not feel that it is proper to legislate in this field while the litigation is in process." These references are the only explicit expressions from Congress or any committee on this question.

The Comptroller-General repeatedly urged Congress to amend Section 412(b) so as to permit absorption of the business losses. R. 47, 240. Congress refused to act.

Respondents respectfully request that the words "at least" be eliminated from this sentence of the opinion.

Respondents are fearful that their retention will give petitioner an undeserved headstart in any future litigation in this area.

Respectfully submitted,

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Appendix A.

Table 4.—Canal and Other Marine Operations—Operating Income, Year Ended June 30, 1954

	Direct expenses including cost transfers	Allowance for depreciation	
REVENUE:			
Canal tolls			$33,302,149
Credit for tolls on U. S. Government vessels			3,888,957
Harbor pilotage, tug, launch, and other services			2,874,650
Total revenue			40,065,756
OPERATING EXPENSES:			
Navigation services and control	$ 5,087,034	$ 227,374	
Locks operation and maintenance	4,364,820	977,824	
Provision for periodic overhaul of locks	1,080,800		
Dredging of channel and harbors	2,174,419	361,513	
Meteorology and hydrography	343,152	482	
Operation and maintenance of dams, reservoirs and spillways	106,727	150,152	
Operation and maintenance of ferry across canal	464,646	35,490	
Annuity to Republic of Panama (repayment to U. S. Treasury)	430,000		
Damage to vessels	86,186		
Other operating expenses	188,622	24,656	
Total operating expenses	14,326,406	1,777,491	16,103,897
Less costs transferred to other activities			301,982
Net operating expenses			15,801,915
OPERATING INCOME (table 3)			24,263,841

The accompanying "Notes Pertaining to the Financial Statements" are an integral part of this statement.

House Resolution 44, 81st Cong. 1st Sess., adopted February 28, 1949 (95 Cong. Rec. 1617)

Whereas it is the responsibility of the Congress of the United States to establish the policy to be followed in prescribing the tolls that shall be levied for the use of the Panama Canal; and

Whereas there have been substantial changes in economic conditions since Congress last established such policy, including the effect of such tolls upon American shipping: Therefore be it

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Resolved, That the Committee on Merchant Marine and Fisheries or any duly authorized subcommittee thereof is authorized to make a full and complete study and analysis of the financial operation of the Panama Canal with particular reference to the proper accounting and allocation of costs attributable to—

(a) the transit of the Canal by commercial, governmental, and military vessels of United States and foreign nations;

(b) military activities of the United States in and connected with the Canal Zone;

(c) United States civil government, including, but not limited to, sanitation, public schools, playgrounds, hospitals, and so forth;

(d) business operations conducted under the supervision of the Governor General of the Panama Canal by the various business units of the Panama Canal and Panama Railroad Company;

and to recommend to the Congress concerning what elements of cost should be properly used in the future as the basis of a policy to be followed in establishing and levying tolls for the use of the Panama Canal for transit purposes.

Resolved, That the President of the United States be, and hereby is, requested to defer until after submission of the committee's report any change in tolls currently levied for the use of the Panama Canal.